IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.E.C. No. 13 of 2001

DATE OF DECISION: 10.12.2007

Commissioner, Central Excise Commissionerate-II, Chandigarh.

…Petitioner

Versus

M/s Dhillon Kool Drinks and Beverages Ltd. and another

…Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE RAKESH KUMAR JAIN

Present: Mr. Sanjeev Kaushik, Advocate,
for the petitioner.

M.M. KUMAR, J.

This order shall dispose of C.E.C. Nos. 12 and 13 of 2001 as common questions of law are involved. However, facts are being referred from C.E.C. No. 13 of 2001. This petition filed under Section 35G (H?) of the Central Excise Act, 1944 (for brevity, 'the Act') is directed against order dated 17.12.1999 (P-4), passed by the Customs, Excise and Gold (Control) Appellate Tribunal, Northern Division Bench (now known as 'Customs, Excise and Service Tax Appellate Tribunal') (for brevity, 'the Tribunal'), with a prayer to direct the Tribunal to draw statement of the case and refer the following questions of law to this Court for determination:-

"a) Whether modvat credit is admissible under Rule 57A of the Central Excise Rules, 1944, on glass bottles and plastic crates as packing material for aerated water when the value thereof is not

included (i.e. of bottles/crates as such neither declared nor could be ascertained) in assessable value of the final product i.e. aerated water?

b) Whether the breakage of glass bottles, an admissible deduction under Section 4 of the Central Excise Act, 1944, in the light of Tribunal's decision reported as 1993(67) ELT 721 (T), could be considered as part of the assessable value of aerated water for the purpose of allowing modvat credit on glass bottle?

Brief facts of the case are that the assessee-respondent No. 1 are engaged in manufacture of aerated water falling under Heading Nos. 22.01 and 22.02 of the Schedule Annexed to the Central Excise Tariff Act, 1985 (for brevity, 'the Tariff Act') and were availing the Modvat credit on various inputs/packing material under Rule 57A of the Central Excise Rules, 1944 (for brevity, 'the Rules'). A show cause notice was issued to the assessee as a result of changes brought in the budget 1994-95 with effect from 1.3.1994. Consequently it was intimated that vide notification No. 62/94, dated 1.3.1994, the Central Excise duty on aerated water has to be charged ad valorem at specific rate as existing upto 28.2.1994. It was claimed that the assessee was not entitled to avail Modvat credit on packing material i.e. glass bottles and plastic crates. After affording opportunity of hearing to the assessee, the Adjudicating Authority confirmed the demand of Rs. 28,61,113, under Rule 57-I of the Rules

and also imposed personal penalty of Rs. 5,00,000/-, under Rule 173-Q(i)(bb) of the Rules (P-1). From the perusal of record it appears that similar orders were also passed by the Adjudicating Authority in the cases of other assessees' including M/s Amritsar Beverages Pvt. Ltd., Chheharata, District Amritsar (assessee-respondent No. 1 in C.E.A. No. 12 of 2001).

Feeling aggrieved, as many as 8 appeals were filed before the Tribunal by different assessees' (including the assessee-respondent No. 1 in the instant case and M/s Amritsar Beverages Pvt. Ltd., Amritsar), which were heard together. After noticing the assertion of the assessee-appellants that the cost of glass bottles and plastic crates was included in the cost of aerated water, the Tribunal allowed the appeals vide common order dated 5.9.1997, holding that modvat credit of duty shall be admissible wherever the cost of packing material, even on instalment basis, has been included in the assessable value (P-2).

Against the common order in appeal, dated 5.9.1997, the revenue filed reference application before the Tribunal for drawing statement of the case and referring questions of law to this Court for determination (P-3). The Tribunal dismissed the reference application vide its order dated 17.12.1999 (P-4), holding as under:-

> "4. ……we find that the so-called points of law are not points of law but they are in the form of a request for review of the Tribunal's Final Order. The Point at issue was if cost of bottles and crates if included in the value of aerated waters then Modvat Credit would be

admissible to the assessee on bottles and crates. Thus, the entire issue was only based on facts, the fact to verify was whether the cost of bottles and crates is included in the value of aerated waters or not if the answer to this query was in the affirmative than Modvat credit could be taken. Thus, the entire issue was decided based on facts and the fact to be ascertained was whether the cost of bottles and crates was included in the assessable value of aerated waters or not. Therefore, no question of law arises.

5. We also note similar issue came up before this Tribunal in the case of Commissioner of Central Excise, Calcutta I & II Vs. Black Diamond Beverages Ltd. reported in 1998 (27) RLT 788 and this Tribunal held that whether cost of packaging i.e. glass bottles and crates is included in the price of aerated waters is a question of fact and that the question on valuation under Section 4 was outside the purview of Section 35G and the Tribunal had rejected the Reference Applications. We follows the ratio of this decision."

After hearing learned counsel and perusing the record we find that there is no merit in these petitions and the same are liable to be declined. We find that under Rule 57A of the Rules, Modvat credit is admissible on the specified inputs used in the manufacture of final product. Explanation (iii) to Rule 57A of the Rules define that inputs does not include packaging material if its value has not been

included during the preceding financial year in the cost of assessable value. The Tribunal has categorically found as a fact that the cost of packing material has been included in the assessable value although on instalment basis and, therefore, the assessees' are entitled to Modvat credit of duty. The plea taken by the assessees' that the cost of glass bottles and plastic crates was included in the aerated water could not be rebutted by the revenue.

In view of the above, both petitions are dismissed. No cost.

(M.M. KUMAR)
JUDGE

(RAKESH KUMAR JAIN)
JUDGE

December 10, 2007
Pkapoor